Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

ELROY CHESTER,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

APPENDIX A: Final Decision of the Texas Court of Criminal Appeals

APPENDIX B: Decision of the Trial Court

APPENDIX C: State Definitions of Mental Retardation and Adaptive Functioning

APPENDIX D: Texas Court of Criminal Appeals Decisions Post-*Atkins*

APPENDIX A

Final Decision
of the Texas Court of Criminal Appeals

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AP-75, 037

Ex parte ELROY CHESTER, Applicant

Application for a Writ of Habeas Corpus

Case 76044 of the 252nd Judicial District Court of

Jefferson County

Womack, J., delivered the opinion of the Court in which Keller, P.J., and Meyers, Johnson, Keasler, Hervey, Holcomb, and Cockran, JJ., joined. Price, J., dissented.

The applicant in this habeas corpus case is sentenced to death. Under Article 11.071 of the Code of Criminal Procedure, he seeks relief from the sentence on the ground that he is mentally retarded and it would be cruel and unusual punishment to put him to death.[1] The court in which he was convicted has found the evidence insufficient to support the claim. Because the record supports that finding, we deny relief.

Procedural History

The applicant pleaded guilty to capital murder. Our law requires that a jury decide punishment in a case in which

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[1] *See Atkins v. Virginia*, 536 U.S. 304 (2002).

death is a possible penalty.[2] At the punishment phase, the facts of the offense (which we shall discuss below) were undisputed. After hearing evidence of the offense and other evidence relevant to the punishment issues, the jury returned findings that required the trial court to enter a sentence of death.[3] On the appeal that followed, [4] we affirmed the judgment and sentence.[5] We denied habeas corpus relief on Chester's first petition.[6]

This second petition is permitted because the Supreme Court's decision applying the Cruel and Unusual Punishments Clause to a death sentence against a mentally retarded person[7] had not been delivered when Chester filed his first petition.

The convicting court held an evidentiary hearing on the petition. It received evidence that included expert testimony on the issue of mental retardation, the results of various Intelligence Quotient (IQ) tests, and evidence as to the applicant's adaptive behavior functioning. After considering the evidence presented, the trial court entered findings of fact and conclusions of law, ultimately ruling that the applicant had failed to meet his burden to prove his mental retardation by a preponderance of the evidence.

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[2] *See* Code Crim. Proc. Art. 1.13.

[3] *See id.*, art. 37.071, § 2(a)-(g).

[4] *See id.*, § 2(h).

[5] *Chester v. State*, No. 73,193 (January 26, 2000) (not designated for publication).

[6] *Ex parte Chester*, WR-45,249-01 (May 31, 2000) (not designated for publication).

[7] *Atkins*, *supra* note 1.

Appendix A - 3

The Briseno Factors

The applicant now claims that the trial court used an improper standard in finding that he was not mentally retarded.

In another case on a claim for habeas relief on such a ground, *Ex parte Briseno*,[8] we decided that courts should use the definitions of mental retardation as stated by the American Association of Mental Retardation (AAMR),[9] and in the Health and safety Code,[10] and we suggested a series of questions to help fact-finders determine whether applicants have "deficits in adaptive behavior."[11]

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[8] 135 S.W.3d 1 (Tex. Cr. App. 2004).

[9] "Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The disability originates before age 18.

"Five assumptions essential to the application of the definition:

"1. Limitations in present functioning must be considered within the context of community environments typical of the individual's age peers and culture.

"2. Valid assessment considers cultural and linguistic diversity as well as differences in communication, sensory, motor, and behavioral factors.

"3. Within an individual, limitations often coexist with strengths.

"4. An important purpose of describing limitations is to develop a profile of needed supports.

"5. With appropriate personalized supports over a sustained period, the life functioning of the person with mental retardation generally will improve."

American Association of Mental Retardation, Definition of Mental Retardation (2002).

[10] Health & Safety Code § 591.003(13) ("Mental Retardation means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.")

[11] "1. Did those who knew the person best during the developmental stage - his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and, if so, act in accordance with that determination?

Essentially, this results in a three-part test to determine whether an applicant suffers from mental retardation such that *Atkins* relief is warranted. First, whether the applicant has significant limitations in intellectual functioning, which typically appears in the form of low IQ scores. Second, whether these limitations were accompanied by significant deficits in adaptive functioning, usually expressed by limited conceptual, social, and practical skills. Third, whether these limitations occurred and were recognized before the age of eighteen.

The applicant bears the burden to prove these factors by a preponderance of the evidence, in order to show that he or she is mentally retarded.[12] As in all habeas corpus applications, the trial court makes findings of fact and conclusions of law concerning a claim of mental retardation. We will accord almost total deference to those factual findings, as long as they are supported by the record, and particularly when they are based on an evaluation of credibility and demeanor.[13] If the trial court's ruling is not

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"2. Has the person formulated plans and carried them through or is his conduct impulsive?

"3. Does his conduct show leadership or does it show that he is led around by others?

"4. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

"5. Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

"6. Can the person hide facts or lie effectively in his own or others' interests?

"7. Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?" *Briseno, supra* note 8, at 8-9.

[12] *Id.*, at 12.

[13] *Id.*, at 12-13.

supported by the record, however, we may reject those findings.[14]

In the case at hand, there is no dispute as to the third part of the test, that the evidence in favor of a finding of mental retardation occurred and was recorded before the applicant reached the age of eighteen. The applicant's objections to the trial court's findings concern only the first and second factors. We shall address them in turn.

As to the first factor - the applicant's low IQ scores - there does seem to be a legitimate dispute with the findings entered by the fact-finding habeas court. In the "Findings of Fact" submitted by the trial court, the applicant's IQ test results were listed as follows:

1. Weschsler Intelligence Scale for Children (WISC-R) administered by the Port Arthur Independent School District (PAISD) in March 1977, when applicant was seven years old.
    1. Verbal Score = 77
    2. Performance Score = 69
    3. **Full Scale Score = 69**

1. WISC-R administered by the PAISD in March 1982, when applicant was twelve years old.
    1. Verbal Score = 64
    2. Performance Score = 63
    3. **Full Scale Score = 69**

1. WISC-R administered by the PAISD in February 1983, when applicant was thirteen years old.
    1. Verbal Score = 70
    2. Performance Score = 87
    3. **Full Scale Score = 77**

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[14] *Id.*, at 13.

1. Weschsler Adult Intelligence Scale (WAIS) administered by the Texas Department of Corrections in 1987, when the applicant was eighteen years old.

1. Verbal Score = 70
2. Performance Score = 69
3. **Full Scale Score = 69**

The trial court found a number of problems and concerns with the IQ evidence presented. First, the trial court noted that there was conflicting testimony regarding the validity of the applicant's IQ test scores, particularly regarding the large discrepancy between the results of the 1982 and 1983 tests. The trial court eventually concluded that this testimony rendered the 1982 and 1983 test results inconclusive as to the applicant's actual intellectual functioning at the time. The trial court also took issue with the fact that the first three tests were all WISC-R tests, which are no longer in use and have now been replaced by the WISC-III test, which has never been administered to the applicant. The court noted that the WISC-III test was designed to counter criticisms of cultural bias within the WISC-R test, and that using the WISC-R test would not adequately account for cultural, regional, or other types of factors that may have influenced the applicant's test results. Finally, the trial court noted that the Texas education system requires that, in order for a student to be classified as mentally retarded, his or her test results must be below 70 for both verbal and performance scores, not only the full scale score. Taking all of these concerns into account, the trial court concluded that the applicant had failed to persuade the court that his intellectual functioning supported a finding of mental retardation.

Our review of the record, however, shows that the applicant's test scores were misstated in the trial court's findings, specifically in two places. First, in the first test, the

findings report the applicant's performance score as a 69, when in fact the record shows he scored a 65 (the full scale performance score was still correct). Secondly, in the second test, the findings show the applicant with a full scale score of 69, when the record shows he actually received a full scale score of 59 on his second test. Given that the trial court's findings on the applicant's test scores were in conflict with the record, we now reject the court's findings on this issue, and substitute the correct scores as noted here.

With the scores as corrected, the record shows the applicant had his intelligence tested four times in his first eighteen years of life. On three of those occasions, the applicant was assessed a full scale score below 70, including a score of 59 when he was twelve years old. The only time he was scored above a 70 was in 1983, when he scored a 77. There was testimony by the applicant's expert witness that, in his opinion, this score was invalid due to the fact that the test was administered only eleven months after the previous test, thus increasing the likelihood of "practice effects" in its administration.

Although there is no clear number which experts agree will in every case mark the border between what is or is not "significantly subaverage intellectual functioning" as stated in the AAMR's definition of mental retardation, a full scale score of 70 is generally regarded as the benchmark from which a diagnosis of at least mild mental retardation may be made.[15] Regardless of his higher 1983 score, we find the applicant's evidence of subaverage intellectual functioning persuasive. The applicant's scores were otherwise consistent

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[15] IQ scores alone are generally not relied upon to support a diagnosis of mental retardation, but the "mild" range of mental retardation generally implies an IQ level in the range of between 50-55 and approximately 70. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000); *Atkins*, *supra* note, 1 at 309 n.3.

with a diagnosis of at least mild mental retardation. We note in particular the fact that the State's expert witness acknowledged on cross-examination that, despite his reluctance to classify the applicant as mentally retarded, a person with similar IQ scores (as well as the adaptive functioning score, discussed below) would properly be diagnosed as mildly mental retarded. The applicant has met his burden in regard to demonstrating significant limitations in intellectual functioning.

That leaves us with the second factor – adaptive functioning – which, due to its inherently subjective nature, is consistently the most problematic issue for factfinders to resolve when dealing with these types of claims.[16] In *Briseno*, we acknowledged this difficulty and offered seven evidentiary factors to assist factfinders in weighing evidence tending to support or refute a finding of adaptive behavior deficits when evaluating mental retardation claims.[17] As we made clear, however, these factors were intended only to be guidelines for trial courts to work with until the Legislature was to reconvene and establish conclusively both the substantive laws and the procedures that would bring our codes into compliance with the mandate issued by *Atkins*. Yet to this day, no such guidance has been provided by the Legislature. Thus, the temporary suggestions we offered in *Briseno* remain today the only judicial standards governing this unique type of claim under Article 11.071.[18]

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[16] *Briseno, supra* note 8, at 8 ("The adaptive behavior criteria are exceedingly subjective, and undoubtedly expert will be found to offer opinions on both sides of the issue in most cases."); *see also Ex parte Rodriquez*, 164 S.W.3d 400, 405 (Tex. Cr. App. 2005) (reiterating same concern) (Cochran, J., concurring).

[17] *Briseno, supra* note 8, at 8-9.

[18] Code Crim. Proc. Art. 11.071.

The application in his brief criticizes the *Briseno* factors as inadequate for the purpose of accurately evaluating the adaptive behavior deficits of any given applicant. He points specifically to the Vineland Adaptive Behavior Survey as a more reliable alternative. The applicant was administered the Vineland test in October 1987 upon entering the Mentally Retarded Offender Program (MROP) of the Texas Department of Criminal Justice, and he received a score of 57. As noted above, even the State's expert witness at the hearing acknowledged that a person with a Vineland score of 57, combined with an IQ of 69 as measured at the same time, would be correctly diagnosed as mildly mentally retarded.

Persuasive as that may be, we cannot substitute our own judgment for that of the factfinder, so long as the findings are supported by the trial record.

The Applicant Has Not Shown Significant Deficits in Adaptive Behavior

The trial court's findings addressed all seven evidentiary factors listed in *Briseno*, and noted carefully how the applicant had failed to persuade the trial court on each one. For example, in response to the first *Briseno* questions ("Did those who knew the person best during the developmental stage - his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and, if so, act in accordance with that determination?"), the trial court found that the applicant had been classified during his school years as "learning disabled," rather than as mentally retarded. Conflicting testimony was presented regarding the flexible and often confusing standards under which such classifications were made in the Port Arthur Independent School District. Nevertheless, the trial court considered and found more credible the testimony of Vicki Pitman, a

diagnostician and witness for the State. Pitman testified that the applicant's school records labeling him as learning disabled were accurate, and that having a learning disability is not the same thing as being mentally retarded. The trial court likewise was unpersuaded by the applicant's witness Elizabeth Segler, who was the applicant's teacher and who said that, in her opinion, the applicant was moderately retarded. The trial court found Segler's testimony to be contradictory, in that she also testified that the applicant was "certainly" capable of learning if given proper teaching methods, which is also consistent with having a learning disability.

The trial court made similar findings in regards to the planned, rather than impulsive, nature of the applicant's conduct as shown by the facts of the case itself, as well as to the fact that in all of his crimes he acted independently of others instead of being led around. The court found no evidence in either the trial record or the hearing to establish that the applicant's conduct in response to external stimuli was irrational or inappropriate, regardless of its social acceptability.

As to whether the applicant responded coherently and rationally to oral or written questions, the trial court considered the testimony of both parties' experts regarding an evaluation of the applicant conducted by Dr. Ed Gripon, the State's expert. The court was more persuaded by Dr. Gripon's testimony that the applicant was able to converse with him coherently on a wide variety of topics, including current politics, the concept of parole violations, and many specific facts of the crimes to which the applicant had confessed. The trial court also noted the discrepancy in credentials between the two experts, particularly that, while Dr. Gripon had been practicing in the field of psychiatry for thirty-two years and had testified in Texas courts on issues

of mental retardation numerous times, the applicant's expert had been licensed for six years, in which time he had held a total of seven jobs, none for longer than two years. The trial court found the State's expert's testimony to be more credible.

The trial court also found that the applicant was capable of hiding facts and lying to protect his own interests, as demonstrated by the episode in which he told the investigators that he would take them to where he had hidden his gun, all the while apparently planning to get to the gun himself before the investigators could. Finally, the court found that the specifics of the various crimes to which the applicant confessed, including the use of masks and gloves, his practice of cutting exterior phone lines before entering homes to burglarize, and his deliberate targeting of victims like Cheryl DeLeon and his brother-in-law Albert Bolden, showed persuasively that the applicant was capable of forethought, planning, and complex execution of purpose.

The Facts On the night of February 6, 1998, Erin DeLeon, age seventeen at the time, was home alone with her one-year-old son Tony. Erin and Tony lived in the home of Erin's mother, Kim Ryman DeLeon, along with Erin's sisters Claire and Sasha. After putting Tony to bed, Erin spoke briefly on the phone with her boyfriend, and then began watching a movie in the living room.

Unbeknownst to Erin, the applicant was outside the house, watching her. He had been walking through her neighborhood, searching for a place to burglarize. He had with him a pair of gloves, a knitted hat in which he had cut two holes to make a ski mask, and a gun which he had stolen in a previous burglary. He had scratched the serial numbers off of the gun. Upon reaching the Ryman home, he recognized it as one he had burglarized previously. He

watched Erin through the open window blinds and, when it appeared that she was home alone, he went around the side of the house and cut the phone lines, which he later said was his normal practice when committing a burglary. He checked the side door to the house and found it unlocked. The applicant put on his mask and gloves, and entered the house through the side door. That door opened into the kitchen, which he entered, and then came into the living room where Erin was.

The applicant grabbed Erin by the hair, held the gun to her head, and demanded money or jewelry. Erin replied that they had a little jewelry, but no money, in the house. The applicant then took her through the house, still holding her by the hair, searching her mother's and sisters' bedrooms to confirm that no one else was at home. He asked Erin where her mother was and if she was coming home. Erin said her mother would be home in the morning. He then asked Erin who she had been on the phone with earlier. Erin replied that she had spoken with her boyfriend.

The applicant then took Erin into her mother's bedroom, from which he took some jewelry. He then did the same in her sisters' and in Erin's own bedroom. He took her to the dining room, and then had her turn off all remaining lights in the home. He then took her into the garage, still pulling her by the hair.

Once in the garage, Erin offered to turn on the lights but the applicant refused. Instead, he began feeling around in the dark until he found a roll of duct tape. Erin later testified that she believed by the way he was feeling around that the applicant knew exactly what he was looking for in the dark garage.

As they re-entered the house, Erin's sister Claire was arriving at the side door with her boyfriend Tim. They attempted to enter through the side door but the applicant had made Erin lock it, so Claire knocked on the door. The applicant pulled Erin by her hair toward the door and, while hiding behind her with his gun pointed at her head, ordered Erin to unlock the door and let her sister into the house. When Claire entered the house, the applicant pushed Erin forward and yelled at Claire to not say anything or he would "blow her [Erin's] head off." Claire began to babble incoherently and Erin tried to quiet her.

Tim, still unaware of what was happening, was still outside on the porch and asked Claire what was wrong. The applicant ordered Claire to tell Tim that nothing was wrong and that he should leave. Claire complied, but Tim persisted, and the applicant then told him directly to come into the house. Tim's car was still running, so he asked the applicant if he could turn it off first, and the applicant said yes, but if Tim attempted to leave that he would kill both girls. Tim went to turn off his car ignition, and then entered the house.

Once inside, the applicant, still holding Erin by her ponytail and with the gun pointed at her head, demanded jewelry or money from Claire and Tim. They said they had none – Tim showed the applicant his empty wallet, and Claire went to her mother's bedroom to confirm that there was no more jewelry in the house. When Claire returned, the applicant asked Tim what kind of car he had, and specifically whether it was an automatic or a stick shift. Erin later testified that she presumed from those questions that the applicant was thinking of using Tim's car to escape. The applicant then ordered Claire and Tim into the bathroom.

Alone with Erin in the dining room, the applicant ordered her to remove her clothes. Erin began to do so. The applicant tried to remove her bra himself, and did remove her underwear himself. Erin was now kneeling and wearing only her socks, and the applicant used the duct tape to blindfold her. The applicant then called for Tim to come out of the bathroom. The applicant ordered Tim to strip, and Tim removed all of his clothes except for his underwear and socks. The applicant then used the duct tape to blindfold Tim, and to bind his wrists and ankles. After that, the applicant dragged Tim into Erin's bedroom.

The applicant returned to the dining room and ordered Claire to come out of the bathroom. He ordered Claire to remove her clothes, and she complied. The applicant then blindfolded Claire with the duct tape, and seated her on the floor next to Erin. Erin then removed the tape over her eyes enough to see the applicant unzipping his pants and removing his mask, but the applicant came over to push the tape back down over her eyes.

The applicant then raped Erin vaginally, on the floor, next to her sister. When he was done and had removed himself from on top of her, Erin tried to get up, but the applicant pulled her over to where he was now sitting in a chair, and forced her to perform oral sex on him. The applicant kept the gun next to Erin's forehead and threatened to shoot her if she tried to bite him. After the oral sex, Erin moved to the floor area at one side of the room, and the applicant ordered Claire to perform oral sex on him, which she did. The applicant repeated the same threat that he would shoot her if she bit him.

At this point, a car approached the house. The applicant heard the car, ran into the kitchen to dress himself, and then went to stand by the side door to wait for the person

approaching, who turned out to be Willie ("Billy") Ryman, Kim Ryman's brother and the girls' uncle. Billy would often come to the house to check on the girls, when he knew their mother was at work. Billy opened the door and turned on the light. The applicant yelled at him to come inside and, upon entering, the applicant shot him. Billy fell to the ground immediately, and the applicant dragged his body into the kitchen, where Billy eventually died. The applicant then ran out of the house. Claire got up and locked the side door, locking the applicant out of the house.

Billy's girlfriend Marcia Sharp had been waiting outside in Billy's truck in the driveway while he went up to the house. Marcia heard the gunshot fired at Billy but thought perhaps it was a car backfiring. Moments later, she saw the applicant run out of the house and then try to go back in, after realizing he had been locked out by Claire. The applicant then approached the truck on the passenger side, where Marcia was sitting. The door was unlocked but, just as the applicant reached for the handle, Marcia locked it. The applicant was now wearing his mask again. The applicant pulled out his gun and shot once at the lock on the car door. He then noticed that the driver's door was unlocked, so he ran around to the driver's side of the truck, but Marcia quickly reached over and locked that door, too. The applicant shot twice at the lock on the driver's door, but it did not open. He then stepped back, looked at Marcia, and shot twice more at the driver's door window. None of the gunshots hit Marcia. The applicant then ran down the street, away from the house.

The events at the Ryman Deleon home were the culmination of a six-month spree of criminal activity by the applicant, in which he burglarized at least five residences, sexually assaulted two people, murdered at least five people, and fired shots at no fewer than five others. Among the crimes

that the applicant eventually confessed to committing during this period were the following:

- •**The burglary and homicide of John Henry Sepeda.** Like the case at hand, the applicant used wire cutters to cut the phone lines to Sepeda's home before entering it, he wore a mask which he had brought with him, and he carried a gun. He also carried a flashlight. The applicant entered the bedroom where Sepeda and his wife were sleeping, and began to burglarize the room while they slept. Sepeda woke up, and approached the applicant, who shot and killed him. Before fleeing, he demanded that Sepeda's wife give him a ring that she was wearing.

- •**The murder of Albert Bolden**, the applicant's common-law brother-in-law. He gave two reasons to the police for his motive: Bolden had been beating his sister, and/or Bolden had set him up on a date with a woman who turned out to be a transvestite. The applicant invited Bolden to commit a burglary with him, and brought him to a vacant home he knew of in Port Arthur. In fact, the applicant had no intention of burglarizing the home and instead admitted that he just wanted to kill Bolden. After leading Bolden to the vacant home, the applicant directed him to walk through the door first, and then shot him in the back of the head. The applicant then fled the scene and hid the gun that he used.

- •**The burglary and homicide of Etta Stallings.** Again, the applicant wore a ski mask, carried a gun and a flashlight, staked out the home beforehand to see who was there, and cut the phone lines outside before breaking into the home. As in the Sepeda case, he attempted to burglarize the home while

Stallings and her husband were asleep, but Stallings woke up. She pulled a gun out of her dresser drawer, and the applicant shot her, killing her. The applicant then took the property he had stolen, as well as Stallings' gun, and stashed it all under a nearby vacant house.

- •**The murder of Cheryl DeLeon.** The applicant knew DeLeon because they had worked together at a local Luby's restaurant for eleven months in or around 1992. He admitted he would often sexually harass her, and she would complain about it to their boss. Knowing that she still worked at Luby's, the applicant likewise knew that she got off work at 8:00 in the evening. After it had gotten dark outside, the applicant went to DeLeon's home. As in the case at hand, he was wearing a mask, carrying a gun, and wearing gloves. This time, he unscrewed the lightbulb illuminating a storage shed near the back door of her house, so that he could lay in wait under cover of darkness. He laid down on the ground by the storage shed, and waited thirty to forty-five minutes in the dark until DeLeon's car pulled into the driveway. As DeLeon got out of her car and walked to her back door, the applicant ran up and grabbed her. They struggled, she screamed, and he hit her in the side of the head with the gun. According to the applicant, the gun went off accidentally when he hit her with it, shooting her dead. The applicant then fled to his father's home, where he hid the gun in the attic.

The Port Arthur police arrested him. While in custody, and after being asked to provide a blood sample, the applicant told investigator Timothy Smith that he would take him to where the gun that was used in the crime was located. The

applicant knew Smith and seemed to trust him more than he did the other officers. Smith, two other investigators from the District Attorney's office, and two local detectives then accompanied the applicant to his father's house. The applicant was wearing a jail jumpsuit, as well as leg restraints attached by a chain to another chain around his waist, which in turn connected to a pair of handcuffs, thereby shackling his wrists to his waist, such that his mobility was extremely limited.

Upon reaching his father's house, the applicant attempted to move ahead of the others. Smith had admonished the applicant that he would not be allowed to handle or touch the gun himself, but the applicant insisted that he would have to locate the gun personally because it was in a place that difficult to reach. The applicant assured Smith that the gun was unloaded, and that he himself was the only one who would be able to reach it.

The applicant led the others to his bedroom and, despite efforts to prevent him from moving ahead too quickly, walked over near his bed and dragged a small nightstand to a position directly underneath a hole in the ceiling. The applicant began to climb on top of the nightstand, but was quickly told to stop. One of the investigators, Rose, then climbed on top of the nightstand to look in the hole, and the applicant directed him to look in a specific direction for the gun. Rose looked and reached around inside the hole as directed by the applicant, but could not find the gun. The applicant then climbed atop the same nightstand where Rose was standing and, while continuing to direct Rose to look in the same direction he had previously indicated, attempted to reach with his shackled hands in the opposite direction from where he had told Rose to look.

Smith had been watching the applicant the entire time and, when he saw the applicant reach with his hands in the other direction, drew his gun and ordered the applicant to stop moving. The applicant was taken down from the nightstand and escorted to sit on a nearby couch. Smith then climbed atop the nightstand himself and looked in the direction where the applicant had attempted to reach. He immediately saw the gun and retrieved it. The gun was fully loaded.

Conclusion

The trial court did not err in concluding that the applicant failed to meet his burden of proving he was mentally retarded. The application for habeas corpus relief is denied.

Delivered February 28, 2007.

Do Not Publish.

APPENDIX B

Decision of the Trial Court

Cause No. 76044-B

THE STATE OF TEXAS	*	**IN THE CRIMINAL**
VS.	*	**DISTRICT COURT OF**
ELROY CHESTER	*	**JEFFERSON COUNTY, TEXAS**

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the Applicant's Application for Writ of Habeas Corpus, the Respondent's Original Answer, the evidence produced at hearing and all evidence previously presented and found within the trial records in Cause No. 76044 and 76044-B, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Applicant, Elroy Chester, was indicted and convicted of the felony offense of Capital Murder in Cause No. 76044 in the Criminal District Court of Jefferson County, Texas.

A. After the jury affirmatively answered the first and second special issues, the trial court assessed punishment at death by lethal injection.

B. The Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion delivered January 26, 2000.

2. Applicant filed an Application for Post Conviction Writ of Habeas Corpus, asserting via the United States Supreme Court opinion in ***Atkins v. Virginia, 536 U.S. 304 (2002)*** that Applicant's execution would violate the Eighth Amendment prohibition against the execution of the mentally retarded. Applicant further submitted in his Application the argument that the death sentence imposed violated the Sixth Amendment of the United States Constitution because there has been no jury determination on the issue of mental retardation.

Issue Regarding the Constitutional Prohibition Against Execution of the Mentally Retarded

3. This Court considered the entirely of the evidence presented on the issue of mental retardation by both the Applicant and the State (Respondent), including the presentation of expert testimony, took judicial notice of all previous proceedings involving Applicant, and all testimony and exhibits introduced during the capital murder trial. (RR.III-81)

4. The Court was provided with expert testimony on the issue of mental retardation from both parties. Psychologist, Dr. David Ott testified on behalf of Elroy Chester. The testimony of Dr. Ott reflected that at the time of his testimony he was a clinical supervisor for the Montgomery County, Ohio Board of Mental Retardation and Disability and that he maintained a side practice. (RR.II-8) The Court noted that having been licensed for six years, Dr. Ott, who testified that Elroy Chester was mentally retarded, has held a total of seven jobs, the longest of which was for two years. He has held his current position for nineteen months. (RR.III-56-67) Dr. Edward Gripon who testified for the State, that Elroy Chester was not mentally retarded. Dr. Gripon has been either training or practicing in the field of

psychiatry since 1972 (32 years), and has testified in Texas courts on issues of mental retardation on many occasions. (RR.III-263-266)

5. The evidence presented established that mental retardation is a developmental disorder that is characterized by limitations in intellectual functioning and adaptive behavior that is present before the age of eighteen. (RR.II-39) Mental Retardation definitions involve a score on an individually administered IQ test, of less than 70, combined with significantly sub-average intellectual functioning with the onset of those concurrent deficits prior to age eighteen. (RR.II-43) Adaptive functioning involves making individual choices and decisions by the individual. (RR.II-47) Extensive testimony was presented by Applicant and by the State on the issue of whether Elroy Chester is mentally retarded. After hearing and considering the totality of the evidence presented on the issue of mental retardation, the Court concludes that determining what constitutes mental retardation in a particular case varies sharply depending upon who performs the analysis and the methodology used.

A. Among the testimony provided was the distinction between mental retardation, a person who is learning disabled, and borderline intellectual functioning.

(1) The Court accepts as factual the distinctions made between a person being learning disabled, and mental retardation, and finds that a person who is learning disabled, or borderline intellectual functioning is not mentally retarded. (RR.IV-197; RR.V-33; RR. VII-Exh. 42) [Note that some of the school records utilized the notation LD, referring to learning disabled.]

Elroy Chester also spent portions of his school day in regular classes as opposed to resource (special education) classes. (RR. VII-Exh. 42)

The Intelligence Quotient (I.Q.) Tests

6. The Court concludes from the record and testimony that one way of measuring intelligence is by way of standardized tests. (RR. II-69) Diagnostic criteria for mental retardation does not allow intelligence quotient to be measured by any types of group test. Instead, criteria require individual testing with tests such as the Weschsler. (RR. II-70) The Weschsler Scales are the most commonly used measure. There are different Weschsler tests, shaded by the age range for which the test is deemed appropriate. These tests have become predominant in the United States, developed in the 1960's but periodically updated to account for changes in population and population knowledge. (RR. II-69-72) There are three categories of mental retardation: mild, moderate, severe and profound. (RR. II-8)

A. Individuals with mild mental retardation register generally score 55-70, plus or minus the standard error of measurement of five points, on intelligence quotient (I.Q.) tests. (RR. II-58-59; RR. III-143)

B. The testimony provided indicates that if properly administered, these tests can be viewed as being reliable measures of intelligence. (RR. II-72) The Court finds that in close cases the validity of these test scores is debatable. The testimony established that the Weschsler tests when administered are divided into two main areas or halves:

(1) Verbal portion: Questions are presented, or an individual is shown stimuli and asked to give a verbal response. It examines a variety of verbal abilities, word knowledge, fund of general information and verbal abstract reasoning. (RR. II-73-74)

(2) Performance portion: Non-verbal abilities are examined and capabilities such as visual motor coordination and the ability to differentiate essential from non-essential details are evaluated. (RR. II-74)

C. The Weschsler tests relevant to these proceedings and which were administered to Elroy Chester were the:

(1) Weschsler Intelligence Scale for Children-Revised (WISC-R)

(2) Weschsler Adult Intelligence Scale (WAIS)

5. The Court finds that the following Intelligence Quotient tests (with related dates and scores) were administered to Applicant:

A. The first test: Weschsler Intelligence Scale for Children (WISC-R) - This test was administered to Elroy Chester in March, 1977, by the Port Arthur Independent School District when he was approximately seven and a half years old. (RR. II-95-97)

(1) Verbal Score = 77
(2) Performance Score = 69
(3) Full Scale Score = 69

B. The second test: Weschsler Intelligence Scale for Children (WISC-R) - This test was administered to Elroy Chester in March, 1982, by the Port Arthur Independent School District when he was approximately 12 ½ years old. (RR. II-97-98)

(1) Verbal Score = 64
(2) Performance Score = 63
(3) Full Scale Score = 69

C. The third test: Weschsler Intelligence Scale for Children (WISC-R) - This test was administered to Elroy Chester in February, 1983, by the Port Arthur Independent School District when he was approximately 13 ½ years old.
(RR. II-99-100)

(1) Verbal Score = 70
(2) Performance Score = 87
(3) Full Scale Score = 77

D. The fourth test: Weschsler Adult Intelligence Scale (WAIS) - This was the first adult test given to Elroy Chester at age eighteen by the Texas Department of Corrections in 1987 (RR. II-102-103)
(RR. II-102-103)

(1) Verbal Score = 70
(2) Performance Score = 69
(3) Full Scale Score = 69

E. The fifth test: Weschsler Adult Intelligence Scale (WAIS) - This was given to Elroy Chester by Dr. Dan Roberts in contemplation of his trial for the offense of Capital Murder, when he was approximately twenty-nine years old.

(1) Verbal Score = 67
(2) Performance Score = 71
(3) Full Scale Score = 66

6. The Court was presented with conflicting testimony regarding the validity of the various I.Q. test scores. Elroy Chester's lawyers presented testimony through Dr. Ott that the 1983 test scores were an anomaly to be discounted. (RR. II-106-109) The State countered with testimony from Vicki Pitman, a diagnostician that the 1983 test score was more likely indicative of his abilities. (RR. IV-211) Mrs. Pitman further testified that in her opinion the 1982 scores were perhaps not valid assessments, as indicated by the fact that the school records gave no indication that the diagnostician administering the test was concerned enough to follow-up with adaptive behavior testing. (RR. II-208-210) Intelligence Quotient tests alone, without evaluations of adaptive functioning cannot be used to conclusively to resolve the issue of mental retardation. (RR. IV-236-237) The Court accordingly finds that the test results from both the 1982 and the 1983 Intelligence Quotient tests are inconclusive as they remain subject to differing interpretations.

7. The Court finds that the test results from the Intelligence Quotient (I.Q.) tests taken by Applicant during his lifetime do not conclusively establish that Applicant is mentally retarded for the following reasons. The evidence established that Intelligence Quotient tests alone, without an evaluation of adaptive functioning can not conclusively establish mental retardation. The court finds that in cases wherein some, but not all, full-scale scores are within the "margin of error" attributed to intelligence quotient tests, additional issues result in inherent concerns about the validity and significance of the results, to wit:

A. The margin of error with I.Q. tests is plus or minus five (5) points. (RR. III-143) This type of testing is not and never has been considered an exact science. (RR. III-145-146)

B. I.Q. tests are "normed," based upon population, using imprecise information. Dr. Ott testified as to the validity of test results, but conceded he had no knowledge of who the tests were normed upon. He further knew nothing about the socio-economic background of the individuals Elroy Chester was associated with during his educational years in order to assess peerage. (RR. III-125)

C. The first three tests given, all WISC-R's are no longer in use and have been republished because they are outdated. (RR. III-126) The current standard is the WISC-III, which Elroy Chester was not given during his formative years. The Weschsler tests have been accused of being culturally biased. (RR. III-146) The change in the test since given to Elroy Chester were at least partially due to the need to deal with cultural bias that seemed to be exhibited in the test. (RR. IV-204) Numerous articles can be found dealing with cultural bias in standardized tests can be found. (RR. III-146) Elroy Chester is a black male who grew up in Port Arthur, Texas. (RR. III-146, 256) Dr. Ott had no knowledge about the culture of Southeast Texas, nor how various cultural aspects may have impacted upon Elroy Chester. (RR. III-146) Mrs. Pitman testified training discussions involved concerns that cultural bias within the WISC-R tests could result in scores as much as a ten (10) point lower score. (RR. IV-212)

D. Numerous additional factors can affect intelligence quotient scores, including:

(1) The test-taker being hungry or sick, or the room being too hot or cold. (RR. IV-253)

(2) Where and when the test was taken, including time of day or night. (RR. III-147-148)

(3) Circumstances under which the test was taken. (RR. III-148)

(4) The competency and training or lack thereof of the test-giver (RR. III-150)

(5) Whether the test-taker may be having a bad day. (RR. III-150)

(6) Whether the test-taker is fatigued. (RR. III-154)

(7) Whether the test-taker suffers from ADHD. (RR. III-155)

(8) Reading disabilities (RR. III-155)

(9) Peer pressure (RR. III-155)

(10) Learning disabilities (RR. III-155)

(11) The fact that portions of the test involve subjective grading. (RR. III-148)

(12) Whether raw scores were correctly or incorrectly totaled. (RR. III-155)

(13) Whether the chronological age of the test-taker is calculated correctly or incorrectly. (RR. III-155)

8. The Court finds that experts evaluate intelligence quotient test results in different manners that can have significant impact upon interpretation of those results. For example, the testimony presented indicates that the entirety of the Texas educational system differs from the proponent's position about the significance of the verbal and performance scores as opposed to placing primary emphasis only upon the "full scale score." Mrs. Pitman testified that

the standards under which a high school diagnostician operates are set by the Texas Education Agency and the Federal government, and that all Texas schools adhere to the same standards. (RR. IV-183-184) In the Texas education system, the verbal and performance scores on I.Q. tests must both be below 70, and the adaptive behavior measure must also be below 70 to be classified as mentally retarded. Full-scale scores are not considered alone. (RR. IV-206) This court cannot overlook the fact that it is a function of the Texas education system to gain an idea of the student's strengths and limitations as well as educational needs for purposes of developing a viable plan of educational intervention. (RR. IV-171-172) The Court finds that by the standard used by the Texas education system, even if all test scores were considered absolutely valid, Elroy Chester would have scored above the mental retardation range on the tests given in 1977, 1983, 1987, and 1998. The Court finds unpersuasive Applicant's claims that the intelligence quotient test scores establish an accurate assessment of Elroy Chester's intelligence for purposes of determining whether he is mentally retarded.

Adaptive Behavior

9. The Court makes the following fact-findings regarding the evidentiary factors extolled by the Texas Court of Criminal Appeals in **Ex parte Briseno** as they relate to adaptive behavior:

> A. Whether individuals who knew Elroy Chester best during the developmental states of his life believed him to be mentally retarded at the time is subject to disagreement. However, the Court finds that the record does not reflect that family, friends, teachers and employers acted in accordance with a belief that he was mentally retarded.

(1) The Court finds that in the developmental stages of his life, he was classified as "learning disabled," not mentally retarded.

(2) The Court heard testimony indicating that the Texas education system utilizes a process known as Admission Review and Dismissal Committees (ARD's) in assessing student needs for special education programs. Each ARD committee is comprised of an administrator, an assessment person, a special education teacher, a regular education teacher, and a vocational representative. The committee convenes after an initial referral has been made to review the assessment information provided by the diagnostician. They either decide that a student is eligible for special education programs or not. ARD meetings are held at least once a year to review goals and objectives that the teachers have drawn up for the student. ARD's reviews are triggered by failure, disruptive behavior, failing two six-weeks in a row, behavior problems or access to new assessment data. The meetings are held to determine why the student is not being successful. (RR. IV-186-187) Elroy Chester's first ARD was triggered by speech difficulties and some slow academic progress. (RR. IV-192) One function of the committee is to develop goals and objectives (IEP's), that they hope the student will achieve in the coming year. (RR. IV-188-189) The Court finds that conflicting testimony was presented regarding whether the goals and objectives

outlined in multiple IEP's for Elroy Chester were actually attainable. Nevertheless, the Court finds that the goals and objectives documented do not reflect treatment of Elroy Chester as if he were mentally retarded.

(3) School records relating to Elroy Chester indicate that the Port Arthur Independent School District classified him as "Learning Disabled" and speech handicapped, not mentally retarded. (RR. IV-197) The Court finds based upon the credible testimony presented that having a "learning disability" does not mean one is mentally retarded. It means instead that the person has a processing problem, but is capable of learning given the utilization of proper teaching methods. (RR. IV-191) Mrs. Pitman testified that having a learning disability requires normal intelligence. (RR. Iv-202) Contradictory testimony was presented through Elroy Chester's teacher, Mrs. Elizabeth Segler, wherein she opined that he was "moderately retarded." (RR. IV-168) However, Mrs. Segler also testified that Elroy Chester was "certainly" capable of learning if given proper teaching methods, which is consistent with having a "learning disability." (RR. IV-172) She further testified that he had overcome problems in the educational environment and to adapt to different ways of learning. (RR. IV-173) She believed Elroy Chester would be capable of finding work as a school custodian, a restaurant kitchen, and a warehouse or as a construction laborer. (RR. IV-174)

(4) The court finds that placement in special education classes is not necessarily indicative of mental retardation. Mrs. Pitman, the high school diagnostician, testified that a fallacy exists with special education programs. Although not designed to operate in such a fashion, once someone enters special education classes at an early age, they almost never get out because the student can't catch up with the rest of the class. The student loses out on opportunities to achieve more by the time he reaches high school. (RR. IV-194) The court finds therefore that the fact that Elroy Chester attended special education classes is not indicative of mental retardation.

(5) Mrs. Pitman testified that upon graduation, the generally accepted procedure is to notify as many agencies as possible and ask them to attend an ARD meeting to provide the student with a transition from high school to the community. (RR. IV-196) The Port Arthur Independent School records reflect that Elroy Chester met academic requirements for graduation applicable to non-handicapped students. (RR. VIII-St.Exh.#8, page 9) The Court does not accept Mrs. Segler's opinion was that such a notation is a clerical error as conclusive or convincing evidence that the records' notation regarding graduation is incorrect. (RR. IV-136-137) The records do not reflect that Elroy Chester was referred to outside agencies upon graduation. (RR. IV-198) The Court finds that the school records from the Port Arthur Independent

School District, relating to Elroy Chester do not support a determination that he was treated as mentally retarded during his formative years, but instead demonstrate the School District's expectations of his capabilities were consistent with a learning disabled, but not mentally retarded individual.

B. The Court concludes that the record demonstrates Elroy Chester's actions were not entirely impulsive, but rather that he is capable of and has formulated plans and carried them through. In light of the factual information surrounding the crime spree and the commission of the primary crime, the Court finds persuasive Dr. Gripon's testimony that Elroy Chester can formulate plan and carry them through. His testimony, found credible by this court explains that although we all have impulsive conduct at times, the predominant focus of the conduct of Elroy Chester was not impulsive in nature. (RR. IV-304)

C. In light of the information contained within the trial record and the evidence presented during the hearing of this cause, the credible evidence does not establish that Elroy Chester is easily led by others, but instead reflects that he acts independently of others.

D. In light of the information gleaned from the trial record and the evidence presented during the hearing of this cause, the credible evidence does not establish that Elroy Chester's conduct in response to external stimuli is both rational and appropriate,

albeit at times socially unacceptable and at times criminal.

E. The Court finds that Elroy Chester responds coherently, rationally and on point to questions.

(1) Elroy Chester did not testify during the hearing on the Application for Writ of Habeas Corpus.

(2) Elroy Chester was evaluated during an almost three hour extensive interview by Dr. Ed Gripon, a psychiatrist with thirty two years experience. (RR. IV-263-270) Dr. Gripon has testified many times in the Courts of Jefferson County, Texas. (RR. IV-253) Dr. Gripon testified during the interview Elroy Chester responded coherently, rationally and on point to questions posed to him. He did not wander from subject to subject, but stayed on point. (RR. IV-271) Dr. Ott agreed with that assessment. (RR. III-85-86) Dr. Gripon found him to be a relatively good historian, recognizing that there were some limitations in language abilities and intellectual level. (RR. IV-271) Dr. Gripon did not have to repeat or explain what he was trying to ask. Elroy Chester could give information on any points asked, consistent with his intellectual potential (RR. IV-282) Although Dr. Ott stated he believed many of Dr. Gripon's questions to be leading in nature, Dr. Gripon testified that most of his questions did not involve yes or no answers, but instead asked Mr. Chester to provide information. (RR. IV-283) Dr. Gripon concluded that his language

skills were consistent with a person with an IQ in the borderline intellectual functioning range, which is inconsistent with mental retardation. Elroy Chester was even able to expound upon his answers. (RR. IV-289) According to Dr. Gripon, and corroborated by notes (See State's Exh. #7) taken by Dr. Ott during the interview process, Elroy Chester was able to hold discussion on numerous subjects, including but not limited to: (See RR. III, pages 77, et seq).

(a) His work history at a car dealership washing cars, a Luby's restaurant, and as a longshoreman. (RR. IV-283)

(b) His legal history and incarceration milestones, including the activities in his life that brought him to this point. (RR. IV-283-284)

(c) A discussion of his criminal activities, his efforts to locate sites to burglarize, the particular items he sought to steal and how much money particular items would bring as a result of their sale. (RR. IV-285)

(d) He discussed what he would do with the money he attained from his crimes. (RR. IV-286)

(e) His interest in sports and politics. (RR. IV-287) He expressed an interest in the Dallas Cowboys, and

discussed briefly how they fared in the playoffs.

(f) His criminal activity as a juvenile.

(g) His tours of time spent in the Texas prison system.

(h) A discussion on shock probation.

(i) The concept of parole violations.

(j) An ability to remember dates.

(k) The historical significance of the current death row Pulunsky Unit as opposed to the Ellis Unit.

(l) His disciplinary problems on death row.

(m) The fact that he likes the radio, television, magazines and music.

(n) Who was the current President of the United States, and the unlikelihood of the election of Al Sharpton, then a current candidate for the democratic nomination.

(o) How to get a letter out of death row.

(p) The keeping of a calendar in his cell.

(q) That his longest relationship was eleven months, and that if he had maintained longer relationships, perhaps he may not have ended up on death row.

(r) The participants in his trial, although he had difficulty with the names.

(s) The facts of his crime spree, including:

- The tools of his burglary trade
- The types of items he would steal and their street values
- How he selected houses for burglary
- The appropriate time of day for commission of crimes
- How he would gain access to a place to burglarize
- The best days of the week for commission of crimes
- What he would do with the money he obtained from his crimes
- How he would make his money ("Hustle") on the streets

(t) His unhappiness with the medical care in TDCJ

(u) A history of having driven a car from Texas to Los Angeles.

(v) What a prison warden is and his responsibility.

(w) He displayed an ability to work through a problem. Dr. Ott testified that when confronted with a multiplication problem involving computing the cost of multiple bars of soap from the prison commissary, that Elroy Chester was unable to do the calculations in the simplest manner, although he did arrive at the correct answer. (RR. III-121-122)

F. The record demonstrates and the Court finds that Elroy Chester is capable of hiding facts and/or can lie effectively to protect his own interests. The trial record, in Vol. IX, beginning on page 94, reflects that when Elroy Chester became a suspect in the capital murder for which he was ultimately convicted, he was asked to give a blood sample. Because he knew Tim Smith, an investigator with the Jefferson County District Attorney's Office and former Port Arthur Police Officer, he asked to speak with him first. He explained to Mr. Smith that he did not trust the officers with the Port Arthur police department, indicated that he was willing to give a sample, but wanted to wait a few weeks before doing it. (RR. IX-85) He ultimately consented to provide a sample. Mr. Chester attempted cover for himself by

telling Mr. Smith that the police department was fabricating charges against him, trying to blame him for the murder of his brother-in-law and the fireman, Willie Ryman. At that time Mr. Smith told him to stop because the police already located stolen jewelry, a mask and clothing used in the crimes. (RR. IX-89-90) Only then did Elroy Chester tell Mr. Smith that there was no point in drawing blood, and that he would take him to the gun used in the murder. (RR. IX-90-91) He apologized to Tim Smith for having caught him in a lie and tried to convince Mr. Smith that he wanted to personally put the gun in his hands. (RR. IX-92) Elroy Chester continually insisted that the gun would be hard to find and that only he knew where it was and could reach it. He told him it was unloaded, and not to worry. (RR. IX-93) Once at the house where the gun was located, Elroy Chester tried to rush ahead, despite being shackled at that point, pulled a nightstand over to a hole in the ceiling and tried to get into the hole. Police had to stop him. Once someone was up in the hole trying to locate the gun, Elroy Chester began misdirecting by telling the person to look in the opposite direction of where the gun was located. (RR. IX-94) Meanwhile Mr. Chester was trying to reach in the other direction where the gun was actually located. Tim Smith was forced to draw his weapon and instruct Mr. Chester to stop what he was doing and have him removed. Police then found the full "loaded" weapon right where Chester was reaching. (RR. IX-95-96) Only then did Elroy Chester indicate he would cooperate with the police to make it as easy for his family. His father, mother and sisters were there at the time. (RR. IX-96)

G. The Court having considered the evidence of his crime(s), and putting aside any heinousness or

gruesomeness surrounding the capital offense for which he was convicted, finds that the commission of the capital crime and additional offenses produced for consideration demonstrated forethought, planning and complex execution of purpose. The record in this regard reflects more than just a single offense, but instead an extensive crime spree:

(1) **Reporter's Record/Trial-Volume IX**

Elroy Chester committed several murders beginning with a burglary in the summer of 1997. The record reflects that he committed many burglaries, a fact to which he confessed and to which he admitted to Dr. Gripon and described as "hustles." In most of those instances, he scouted the location, brought with him a weapon, flashlight, and wire cutters to cut the phone lines, and wore a mask to hide his identify. He took items of value he could dispose of for profit. He would then hide the items until selling or giving some away, and hid some things at his sister's house. Sometimes he would check several houses before deciding which one to break into.

Elroy Chester exhibited considerable forethought and planning in the set-up and murder of his brother-in-law, Albert Bolden. After lying about his motive for killing Mr. Bolden, Mr. Chester ultimately admitted that he did it because Mr. Bolden had set him up on a date with a transvestite. He took advantage of the fact that Mr. Bolden wanted to commit a burglary. They then staked out a

house, went in through the back window. Chester admitted he did not really want to commit a burglary, but had already planned that he was going to kill Mr. Bolden. In this manner he set Albert Bolden up for the killing by waiting until they were both inside the house they were burglarizing, waited for him to turn his head, then shot him. He then went to his sister's house and hid the gun, and never admitted until his confession that his the one who killed Albert Bolden.

Elroy Chester exhibited considerable forethought and planning in the murder of Cheryl Deleon. He met Ms. Deleon while working at a Luby's restaurant. He didn't like her attitude and the fact that she complained about him making sexual comments to her. On the night of the murder, he went to her home and hid outside. He waited for it to get dark, and knew she got off work at 8:00 p.m. To facilitate his plan he unscrewed the light bulb by the storage house and hid by the side of the building for thirty to forty-five minutes waiting for her to arrive. He brought his .380 pistol, was wearing gloves, and a ski mask. When she arrived home, he accosted her, demanded money and ended up shooting her in the head. He later told police that he did not mean to kill this woman, but the gun went off when he was hitting her in the head with it.

Elroy Chester exhibited considerable forethought and planning in the murder of Willie Ryman, for which he was convicted of

capital murder in this cause. After casing the house where the murder occurred, and seeing a girl inside, he watched patiently to be sure she was alone. Then he cut the phone lines, as he had in all the places he burglarized. He checked around the house for any easy point of entry and found the back door unlocked. As was typical, he was wearing a mask and gloves. Once inside he found the girl sitting on the couch. He told her he would not hurt her if she did what she was told. Then he asked for valuables. He took money and jewelry. At that point his plan went awry and he was forced to adapt to a changing scenario. The girl's sister drove up. Chester instructed the girl to tell her sister to come into the house, and that he would kill her if she did anything stupid. The sister was accompanied by a boyfriend who was also ordered into the house. Elroy Chester was at that point outnumbered three to one, so he separated the three by putting the youngest sister with her boyfriend in the bathroom. Because he had carefully "cased" the house, Elroy Chester was able to order the first girl to get some tape out of the garage. He utilized the tape to tie her up after forcing her to strip naked. Then he taped her eyes so she couldn't see. Then he stripped the other girl and the boy and taped them up also. He talked in a manner that would keep them scared. He told them, for example, that he had just gotten out of prison and that he hated all white people. Elroy Chester then forced intercourse and oral sex on the older of the two girls, and was in the process of

making the younger girl perform oral sex on him when an uncle of the girls arrived. At that time, Elroy Chester hid in the kitchen, turned off the lights, and waited for the man to enter before shooting him. In his escape, he went outside and confronted the woman waiting in a truck for the uncle and fired two times at her through the window, running off when she apparently would not open the truck. Once at his father's house, Elroy Chester removed his jacket, threw away a broken necklace taken in the incident, hid the gun in the attic and later lied to police about whether he knew anything about the incident.

The Mentally Retarded Offender Program and Borderline Intellectual Functioning

10. The Court reviewed and considered the records from the Institutional Division of the Texas Department of Criminal Justice regarding Elroy Chester's participation in the Mentally Retarded Offenders Program. Applicant presented the testimony of Dr. Henry Orloff, a licensed clinical psychologist who worked with the Department of Corrections, and at one time was a supervisor for the program. It was undisputed that Elroy Chester was enrolled and participated in the Mentally Retarded Offender Program. The Court finds however that enrollment and participation in the program is not limited to individuals who are mentally retarded. Dr. Orloff testified that participants were eligible for the program whether classified as mentally retarded or merely as borderline intellectual functioning. (RR. IV-70-71)

A. The Court finds based upon the evidence that people with borderline intellectual functioning on the

individually administered I.Q. tests will attain approximate scores between 71-84. Their adaptive behaviors are better than an individual who is mentally retarded. These persons are not mentally retarded. (RR. II-65-66)

B. The Court rejects the assertion that diagnostic coding labeling Elroy Chester only as borderline intellectual functioning rather than as mentally retarded is a coding error. First, Dr. Henry Orloff testified that he had no independent recollection of Elroy Chester apart from the documents presented for his review. (RR. IV-30-31) He did not do the psychological evaluations or the social histories on this Applicant. (RR. IV-70) He plainly testified that a person could have an I.Q. of 71 to 89 and still qualify for the program. (RR. IV-71) He said he believed his job was to surround himself with people in whom he was confident and to make sure in his mind that he was comfortable with the decisions being made. (RR. IV-72-75) Dr. Orloff explained that records notations and findings were the result of clinical teams, in whom he was confident. Upon cross-examination, Dr. Orloff remembered the names of many of the members of the clinical team members. They were psychologists, social workers, nurses, vocational assessors, and correctional officers. (RR. IV-75-83) The psychologists conducted the evaluations. The social workers were responsible for assessments of adaptive behavior. The vocational assessors would make assessments of job training. The correctional officer had the responsibility of observing the inmate's adaptive behavior in the housing areas of the institution. (RR. IV-23-26) Dr. Orloff testified at one point that he regarded the records maintained at the evaluation process as reliable historical

documents, and that he had no reason to question the recitation of the steps taken and the data that was reported and that he did much of the training. (RR. IV-30) The Court found particularly significant and troubling, Dr. Orloff's assertions that emphasis was placed upon determining eligibility for the program rather than "quibbling" over a diagnosis. (RR. IV-46-47, 70)

The Court finds Dr. Orloff's testimony asserting that the diagnostic coding within the records of the Mentally Retarded Offender Program is unconvincing and not supported by the greater weight of credible evidence. He said that the diagnostic code labeling Elroy Chester as borderline intellectual functioning is incorrect and the coding should have reflected mild mental retardation. In light of his testimony regarding the make-up, training and supervision of the clinical team responsible for the coding, the Court finds this testimony not credible. The coding at issue is found in multiple documents, (Individualized Rehabilitation Plans) with approximately twenty-six individuals bearing the responsibility for the label of "borderline intellectual functioning," and some of those documents contain the notation within the body of the report's. The evidence does not suggest a coding error. (RR. IV-75-94; Trial Exhibits Vol VI-#3-214, #3-216, #3-218, #3-219, #3-222, #3-226, #3-230, #3-233)

C. The Court finds the testimony of Zelma Coleman and Gloria Sanders, both sisters of Elroy Chester, to establish only that Elroy Chester appeared to have had learning disabilities, but not that he was mentally retarded. Zelma Coleman

testified that Elroy was a typical kid. He was hard to understand as a child because of a speech defect, (mispronouncing words and stuttering) but that he got better as he grew up. (RR. III-250-253) However, she also said she didn't know how well he did in school because she moved out of the home when he was only ten or eleven years old. She therefore wasn't around him during a large portion of his life. (RR. III-250-261) The Court considered the testimony of Gloria Sanders to shed little additional light upon the overall circumstances of her brother's intellectual functioning and adaptive behavior, particularly when balanced with the overall record in this cause. Ms. Sanders additionally exhibited unusual behavior that cast a shadow over her credibility when exhibiting anger at the court's brief interruption of her testimony. (RR. III-272) The Prosecutor asked her why she turned and made a face at the judge. Her response was that it was irrelevant, she was nervous, and that if she did that she apologized. Then she said she had no idea what the prosecutor was talking about. (RR. III-281-282) Her testimony otherwise appeared to claim she had to do most things for Elroy as he was growing up. The Court finds that such assertions were not credible in light of the overall record, particularly the school records of the Port Arthur Independent School District.

CONCLUSIONS OF LAW

1. The burden of proof in a Writ of Habeas Corpus action is upon the applicant to prove his allegations by a preponderance of the evidence. ***Hall v. State,*** **2004 Tex.Crim.App. LEXIS 817;** ***Ex parte Briseno,*** **2004 Tex.Crim.App. LEXIS 199; Ex parte Richardson, 70 S.W.3d (Tex.Crim.App. 2002);** ***Valdez v. State,*** **82 S.W.3d 784**

(Tex.App.-Corpus Christi 2002). Mental retardation is comparable to an affirmative defense, and thus, the burden is always upon the defendant to prove that condition by a preponderance of the evidence regardless of when the claim is presented. ***Hall v. State*, 2004 Tex.Crim.App. LEXIS 817.** The Court finds that Applicant has failed in its burden to prove by a preponderance of the evidence that he is mentally retarded.

A. The evidence does not support a finding that Applicant suffered nor suffers from a disability characterized by (1) significantly sub-average intellectual functioning; (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18.

2. The Texas Court of Criminal Appeals has provided Courts with evidentiary factors which fact-finders in the criminal trial context should focus upon in weighing evidence to assist in determining issues of mental retardation. Those factors are:

A. Did those who knew the person best during the developmental state - his family, friends, teachers, employers, authorities - think he was mentally retarded at that time, and, if so, act in accordance with that determination?

B. Has the person formulated plans and carried them through or is his conduct impulsive?

C. Does his conduct show leadership or does it show that others lead him around?

D. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?

E. Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

F. Can the person hide facts or lie effectively in his own or other's interests?

G. Putting aside any heinous or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning and complex execution of purpose?

This Court's review of evidentiary factors relating to adaptive behavior suggested relevant by the Court of Criminal Appeals in ***Ex parte Briseno*, 2004 Tex.Crim.App. LEXIS 199**, Weigh Conclusively Against Applicant's argument that he is mentally retarded.

3. A trial judge's findings of fact are afforded almost total deference, especially when those findings of fact are based upon credibility and demeanor. ***Hall v. State*, 2004 Tex.Crim.App. LEXIS 817**.

4. Mental retardation issues do not require a jury determination of mental retardation in a post-conviction proceeding. There is no mechanism set out in the applicable habeas corpus statute, article 11.071 that provides for a jury trial on an issue first raised in a post-conviction habeas corpus proceeding. ***Ex parte Briseno*, 2004 Tex.Crim.App. LEXIS 199**.

Cause No. 76044-B

THE STATE OF TEXAS	*** IN THE CRIMINAL**
VS.	*** DISTRICT COURT OF**
ELROY CHESTER	*** JEFFERSON COUNTY, TEXAS**

ORDER

THE CLERK IS HEREBY ORDERED to prepare a transcript of all papers in Cause No. 76044-B and transmit same to the Court of Criminal Appeals, a provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. All of the applicant's pleadings filed in this cause, including his application for writ of habeas corpus;
2. All of the Respondent's pleadings filed in this cause, including the Respondent's Original Answer;
3. Any affidavits filed in this cause;
4. This Court's Findings of Fact, Conclusions of Law and Order denying relief in this cause;
5. The indictment, judgment, sentence, docket sheet, trial record including the Clerk's Record and the Reporter's Record, and any appellate record in this cause, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER ORDERED to send a copy of the Court's Findings of Fact and Conclusions of Law, including its order to Applicant's counsel, Feldman & Orlansky, 500 L Street - Suite 400, Anchorage, Alaska 99501 and the Jefferson County District Attorney's Office, P.). Box 2553 - Beaumont, Texas 77701.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 76044.B

SIGNED this 26th day of July, 2004.

s/Charles Carver
Presiding Judge
Criminal District Court
Jefferson County, Texas

APPENDIX C

State Definitions of Mental Retardation and Adaptive Functioning

State Definitions of Mental Retardation and Adaptive Functioning

ALABAMA

ALA. CODE § 15-24-2(3) (2006): MENTALLY RETARDED PERSON. A person with significant subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period, as measured by appropriate standardized testing instruments. [Adopted for social services purposes, not for criminal law purposes]

Ex Parte Perkins, 851 So. 2d 453, 455-56 (Ala. 2002) (not adopting any definition for criminal cases, because defendant in that case did not meet "even . . . the broadest definition of mental retardation")

Tarver v. State, 940 So. 2d 312, 321 (Ala. Crim. App. 2004) (directing trial court to consider both the definition from the social services statute and the guidelines in *Atkins* (citing 536 U.S. at 308 n.3, which contains the DSM-IV and AAMR 9th edition criteria for assessing adaptive functioning))

Holladay v. Campbell, 463 F. Supp. 2d 1324, 1343-46 (N.D. Ala. 2006) (analyzing adaptive functioning using the AAMR 9th edition criteria)

ARIZONA

ARIZ. REV. STAT. ANN. § 13-703.02(K)(1) (2007): "Adaptive behavior" means the effectiveness or degree to which the defendant meets the standards of personal independence and social responsibility expected of the defendant's age and cultural group.

(K)(3): "Mental retardation" means a condition based on a mental deficit that involves significantly subaverage general intellectual functioning, existing concurrently with significant impairment in adaptive behavior, where the onset of the foregoing conditions occurred before the defendant reached the age of eighteen.

ARKANSAS

ARK. CODE ANN. § 5-4-618(a)(1) (2006): "mental retardation" means: (A) Significantly subaverage general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and (B) A deficit in adaptive behavior.

CALIFORNIA

CAL. PENAL CODE § 1376(a) (2007): "mentally retarded" means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.

In re Hawthorne, 105 P.3d 552, 556-57 (Cal. 2005) (noting that the legislative definition derives from the AAMR and DSM clinical definitions and holding that a prima facie claim of mental retardation requires expert opinion referring to the deficits in the AAMR and DSM categories)

COLORADO

COLO. REV. STAT. § 18-1.3-1101(2) (2007): "Mentally retarded defendant" means any defendant with significantly subaverage general intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested and documented during the developmental period.

CONNECTICUT

CONN. GEN. STAT. § 1-1g(a) (2007): mental retardation means a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.
(b) "adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group.

DELAWARE

DEL. CODE tit. 11g § 4209(d)(3)d.1 (2007): "Adaptive behavior" means the effectiveness or degree to which the individual meets the standards of personal independence expected of the individual's age group, sociocultural background and community setting, as evidenced by significant limitations in not less than 2 of the following adaptive skill areas: communication, self-care, home living, social skills, use of community resources, self-direction, functional academic skills, work, leisure, health or safety.
(d)(3)d.2: "Seriously mentally retarded" . . . means that an individual has significantly subaverage intellectual functioning that exists concurrently with substantial deficits in adaptive behavior and both the significantly subaverage intellectual functioning and the deficits in adaptive behavior

were manifested before the individual became 18 years of age.

FLORIDA

FLA. STAT. ANN. § 921.137(1) (2007): "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. . . . "adaptive behavior" . . . means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community.

GEORGIA

GA. CODE ANN. § 17-7-131(a)(3) (2006): "Mentally retarded" means having significantly subaverage general intellectual functioning in or associated with impairments in adaptive behavior which manifested during the developmental period.

IDAHO

IDAHO CODE ANN. § 19-2515A(1)(a) (2007): "Mentally retarded" means significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two (2) of the following skill areas: communication, self-care, home living, social or interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety. The onset of significant subaverage general intellectual functioning and significant limitations in adaptive functioning must occur before age eighteen (18) years.

ILLINOIS

725 ILL. COMP. STAT. 5/114-15(d) (2007): In determining whether the defendant is mentally retarded, the mental retardation must have manifested itself by the age of 18. . . . In order for the defendant to be considered mentally retarded, a low IQ must be accompanied by significant deficits in adaptive behavior in at least 2 of the following skill areas: communication, self-care, social or interpersonal skills, home living, self-direction, academics, health and safety, use of community resources, and work.

INDIANA

IND. CODE 35-36-9-2 (2007): "mentally retarded individual" means an individual who, before becoming twenty-two (22) years of age, manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive functioning; that is documented in a court ordered evaluative report.

Pruitt v. State, 834 N.E.2d 90, 108 (Ind. 2005) (interpreting *Atkins* to require "at least general conformity" with the AAMR and DSM-IV definitions, and noting that states "are free to impose a higher standard, but the minimum definition of mental retardation sufficient to meet the national consensus found in *Atkins* must be uniform"; "if a state's definition of mental retardation were completely at odds with the definitions accepted by those with expertise in the field the definition would not satisfy the prohibition")

KANSAS

KAN. STAT. ANN. § 21-4623(e) (2006): "mentally retarded" means having significantly subaverage general intellectual functioning, as defined by K.S.A. 76-12b01 and amendments

thereto, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.
§ 76-12b01(a): "Adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of that person's age, cultural group and community. (d) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from birth to age 18.

KENTUCKY

KY. REV. STAT. ANN. § 532.130(2) (2006): A defendant with significant subaverage intellectual functioning existing concurrently with substantial deficits in adaptive behavior and manifested during the developmental period is . . . a seriously mentally retarded defendant.

Bowling v. Commonwealth, 163 S.W.3d 361, 368 n.7 (Ky. 2005) (quoting *Hill v. Anderson,* 300 F.3d 679, 682 (6th Cir. 2002), for proposition that the Supreme Court "presumably expected that states will adhere to these clinically accepted definitions [in the AAMR and DSM] when evaluating an individual's claim to be retarded")

LOUISIANA

LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1) (2006): "Mental retardation" means a disability characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

MARYLAND

MD. CODE ANN. CRIM. LAW § 2-202(b)(1) (2007): a defendant is "mentally retarded" if: (i) the defendant has significantly below average intellectual functioning . . . and an impairment in adaptive functioning; and (ii) the mental retardation was manifested before the age of 22 years.

MISSISSIPPI

Hughes v. State, 892 So. 2d 203, 216 (Miss. 2004) (applying the AAMR 9th edition and DSM criteria and stating that mental retardation requires "significant limitation in adaptive functioning in two skill areas")

Foster v. State, 848 So. 2d 172, 175 (Miss. 2003) (adopting "the standard or definition of mental retardation . . . enunciated by the Supreme Court in *Atkins,* especially the American Psychiatric Association's definition of mental retardation" and citing DSM-IV at 39-46, thus incorporating the adaptive functioning criteria)

MISSOURI

MO. ANN. STAT. § 565.030(6) (2007): "mental retardation" . . . refer[s] to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

NEBRASKA

NEB. REV. STAT. § 28-105.01(3) (2006): "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior.

NEVADA

NEV. REV. STAT. § 174.098(7)(2006): "mentally retarded" means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.

NEW JERSEY

State v. Jimenez, 908 A.2d 181, 184 n.4 (N.J. 2006) (following the DSM-IV definition, including with respect to finding significantly subaverage adaptive functioning if the defendant has deficits in two of the listed categories, because the parties agreed to this approach)

NEW MEXICO

N.M. STAT. ANN. § 31-20A-2.1(A) (2007): "mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior.

NEW YORK

N.Y. CRIM. PROC. LAW § 400.27(e) (2007): "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of

eighteen. [*See also People v. Lavalle,* 817 N.E.2d 341 (N.Y. 2004) (holding the N.Y. death penalty unconstitutional in other respects)]

NORTH CAROLINA

N.C. GEN. STAT. ANN. § 15A-2005(a)(1)(a) (2007): Mentally retarded. - Significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning, both of which were manifested before the age of 18.
(a)(1)(b): Significant limitations in adaptive functioning. - Significant limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure skills and work skills.

OHIO

State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002) (stating that "[c]linical definitions of mental retardation, cited with approval in *Atkins,* provide a standard for evaluating an individual's claim of mental retardation" and citing the AAMR and DSM definitions quoted in *Atkins* that require "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction")

Hill v. Anderson, 300 F.3d 679, 682 (6th Cir. 2002) (noting that *Atkins* cited with approval the clinical definitions of mental retardation "and presumably expected that states will adhere to these clinically accepted definitions when evaluating an individual's claim be be retarded")

OKLAHOMA

Blonner v. State, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006) (stating that Oklahoma follows the definition that a person is mentally retarded "(1) If he or she functions at a significantly sub-average intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others; (2) The mental retardation manifested itself before the age of eighteen (18); and (3) the mental retardation is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work.")

PENNSYLVANIA

Commonwealth v. Miller, 888 A.2d 624, 630-31 (Pa. 2005) (adopting the three-part test for mental retardation and adopting either the AAMR or DSM criteria for establishing significantly subaverage adaptive functioning)

SOUTH CAROLINA

S.C. CODE ANN. § 16-3-20(C)(b)(10) (2006): "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

SOUTH DAKOTA

S.D. CODIFIED LAWS § 23A-27A-26.2 (2006): mental retardation means significant subaverage general intellectual functioning existing concurrently with substantial deficits in applicable adaptive skill areas.

TENNESSEE

TENN. CODE ANN. § 39-13-203(a) (2006): "mental retardation" means (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) Deficits in adaptive behavior; and (3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

In the social services context, TENN. CODE ANN. § 33-1-101(17) (2003): "Mental retardation" means substantial limitations in functioning: (A) As shown by significantly sub-average intellectual functioning that exists concurrently with related limitations in two (2) or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and (B) That are manifested before eighteen (18) years of age.

Howell v. State, 151 S.W.3d 450, 458 (Tenn. 2004) (quoting the social services definition of subaverage adaptive functioning but not indicating whether it would apply in a criminal case)

UTAH

UTAH CODE ANN. § 77-15a-102 (2006): a defendant is "mentally retarded" if: (1) the defendant has a significant subaverage general intellectual functioning that results in

and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas; and (2) the subaverage general intellectual functioning and the significant deficiencies in adaptive functioning under Subsection(1) are both manifested prior to age 22.

VIRGINIA

VA. CODE ANN. § 19.2-264.3:1.1(A) (2006): *"Mentally retarded"* means a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.
B(2): (requiring reference to multiple sources of information to assess adaptive functioning, including clinical interview, standardized tests, and educational, correctional, and vocational records)

WASHINGTON

WASH. REV. CODE ANN. § 10.95.030(2)(a) (2007): "Mentally retarded" means the individual has: (i) Significantly subaverage intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.
(d): "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.

FEDERAL

United States v. Cisneros, 385 F. Supp. 2d 567, 570 (E.D. Va. 2005) (agreeing to use a jury instruction proposed by the defendant that defines "significant deficits in adaptive behavior" to mean "diminished capacity to understand and process information, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions")

United States v. Nelson, 419 F. Supp. 2d 891, 894-95 (E.D. La. 2006) (considering both the AAMR 10th edition criteria and the DSM-IV criteria because they are "essentially congruent" and not conflicting, and also holding that both the AAMR and DSM-IV definitions "reflect a national consensus" and that "should a defendant meet *either* definition, his execution is prohibited")

APPENDIX D

Texas Court of Criminal Appeals
Decisions Post-*Atkins*

Texas Court of Criminal Appeals Decisions Post-*Atkins*

Ex Parte Bell, 152 S.W.3d 103 (Tex. Crim. App. 2004): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Blue, __ S.W.3d __, 2007 WL 676194 (Tex. Crim. App. 2007): deferring to and upholding the trial court determination that defendant is not mentally retarded; applying an analysis of defendant's adaptive functioning that loosely corresponds to the AAMR skill domains and not addressing the additional *Briseño* factors

Ex Parte Bradford, No. 44,526-02 (Tex. Crim. App. unpublished decision delivered Sept. 15, 2004): deferring to and upholding the trial court determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Briseño, 135 S.W.3d 1 (Tex. Crim. App. 2004): deferring to and upholding the trial court determination that defendant is not mentally retarded, applying the seven new factors regarding adaptive functioning announced in this decision

Ex Parte Carr, No. AP-75,627 (Tex. Crim. App. unpublished decision delivered Feb. 28, 2007): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Clark, No. 37,288-02 (Tex. Crim. App. unpublished decision delivered Nov. 20, 2002): deferring to and upholding the trial court determination that defendant is not

mentally retarded, using *Briseño* factors as part of the analysis

Ex Parte Davis, No. 40,339-05 (Tex. Crim. App. unpublished decision delivered Mar. 29, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Deblanc, No. AP-75113, 2005 WL 768441 (Tex. Crim. App. unpublished decision delivered Mar. 16, 2005): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Elizade, No. WR-48957-02, 2006 WL 235036 (Tex. Crim. App. unpublished decision delivered Jan. 30, 2006): finding defendant failed to establish a prima facie case of mental retardation and therefore denying permission to bring a second state habeas application; concurring opinion proffers analysis of adaptive functioning based on *Briseño* factors

Hall v. State, 160 S.W.3d 24 (Tex. Crim. App. 2004): finding defendant is not mentally retarded, using an analysis of adaptive functioning generally based on AAMR and DSM-IV-TR-type categories, and not mentioning *Briseño* factors

Ex Parte Henderson, No. WR-37658-03, 2006 WL 167836 (Tex. Crim. App. unpublished decision delivered Jan. 25, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used; concurring opinion reviews the record evidence, using an

analysis that blends DSM-IV-TR skill areas and *Briseño* factors

Ex Parte Hines, No. WR-40347-02, 2005 WL 3119030 (Tex. Crim. App. unpublished decision delivered Nov. 23, 2005): deferring to and upholding the trial court's determination that defendant is not mentally retarded, with insufficient analysis to know what standards for adaptive functioning were used

Ex Parte Lewis, __ S.W.3d __, 2006 WL 3499222 (Tex. Crim. App. 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Lewis, No. 44,725-02 (Tex. Crim. App. unpublished decision delivered June 29, 2005): deferring to and upholding the trial court's determination that defendant is not mentally retarded (opinion not available)

Ex Parte Mathis, No. WR-50772-03, 2006 WL 2706745 (Tex. Crim. App. unpublished decision delivered Sept. 20, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Modden, 147 S.W.3d 293 (Tex. Crim. App. 2004): deferring to and upholding the trial court's determination that defendant is mentally retarded, noting that the parties agreed that the defendant is mentally retarded, and the trial court used the criteria of the AAMR and DSM-IV-TR because the evidentiary hearing was held before *Briseño;* dissenting justices would have found defendant not

mentally retarded, using a *Briseño*-based analysis of adaptive functioning

Ex Parte Moore, No. WR-42810-03, 2007 WL 283113 (Tex. Crim. App. unpublished decision delivered Jan. 31, 2007): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used [*see Moore v. Dretke,* 2005 WL 1606437 (E.D. Tex.) (finding defendant is mentally retarded, without analyzing adaptive functioning under *Briseño), vacated due to procedural default, Moore v. Quarterman,* 454 F.3d 484 (5th Cir. 2006)]

Penry v. State, 178 S.W.3d 782 (Tex. Crim. App. 2005): reversing death sentence because of improper instructions, but not criticizing jury instruction that defined mental retardation in terms of the DSM-IV-TR criteria, including the definition that significant deficits in adaptive functioning are established by deficits in 2 of the 10 listed skill areas

Ex Parte Richard, No. WR-47911-02, 2007 WL 841768 (Tex. Crim. App. unpublished decision delivered Mar. 21, 2007): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Rivera, No. 27,065-02 (Tex. Crim. App. unpublished decision delivered July 25, 2003): finding defendant did not submit sufficient evidence to state even a prima facie case of mental retardation [*see also Rivera v. Dretke,* 2006 WL 870927 (S.D. Tex.) (finding defendant is mentally retarded, analyzing adaptive functioning without reference to the *Briseño* factors)]

Ex Parte Robinson, No. WR-57,207-01 (Tex. Crim. App. unpublished decision delivered May 23, 2007): deferring to and upholding the trial court determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Rodriguez, 164 S.W.3d 400 (Tex. Crim. App. 2005): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Simms, No. AP-75625, 2007 WL 602814 (Tex. Crim. App. unpublished decision delivered Feb. 28, 2007): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Simpson, 136 S.W.3d 660 (Tex. Crim. App. 2004): deferring to and upholding the trial court's determination that defendant is not mentally retarded, noting that trial court did not have the benefit of *Briseno;* appellate opinion addresses some *Briseño*-type factors

Ex Parte Stevenson, No. AP-75639, 2007 WL 841127 (Tex. Crim. App. unpublished decision delivered Mar. 21, 2007): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used, but observing that the state agreed that defendant is mentally retarded

Ex Parte Taylor, No. WR-48498-02, 2006 WL 234854 (Tex. Crim. App. unpublished decision delivered Feb. 1, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards of adaptive functioning used by

the trial court; concurring opinion examines record with respect to *Briseño* factors

Ex Parte Thomas, No. WR-16556-04, 2006 WL 3692644 (Tex. Crim. App. unpublished decision delivered Dec. 13, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards of adaptive functioning used

Ex Parte Valdez, 158 S.W.3d 438 (Tex. Crim. App. 2004): deferring to and upholding the trial court determination that defendant is mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Vasquez, No. 50,801-02 (Tex. Crim. App. unpublished order without opinion issued Mar. 10, 2004): upholding trial court determination that defendant is not mentally retarded

Ex Parte Wesbrook, No. WR-52120-02, 2007 WL 841763 (Tex. Crim. App. unpublished decision delivered Mar. 21, 2007): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Wilson, No. WR-46,928-02 (Tex. Crim. App. unpublished decision delivered Nov. 10, 2004): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Woods, No. WR-44,856-02 (Tex. Crim. App. unpublished decision delivered Apr. 27, 2005): deferring to and upholding the trial court's determination that defendant

is not mentally retarded, without any reference to the standards for adaptive functioning used

Ex Parte Wooten, No. WR-47,160-02 (Tex. Crim. App. unpublished decision delivered Apr. 12, 2006): deferring to and upholding the trial court's determination that defendant is not mentally retarded, without any reference to the standards for adaptive functioning used